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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-656

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, *Petitioner*

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSMEN'S UNION, LOCAL 50; PACIFIC MARITIME ASSOCIATION AND NATIONAL LABOR RELATIONS BOARD,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of ILWU Local 50 in Opposition

NORMAN LEONARD
1182 Market Street
San Francisco, California
Attorney for Respondent, ILWU Local 50

Of Counsel
GLADSTEIN, LEONARD, PATSEY & ANDERSEN

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105
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Brief of ILWU Local 50 in Opposition

This case arises out of a dispute between the International Longshoremen's and Warehousemen's Union (ILWU) and Local 701 of the International Union of Operating Engineers (Local 701) with respect to whether longshoremen represented by the ILWU or operating engineers represented by Local 701 should be assigned the work of operating floating cranes used in the loading of logs aboard

ship by members of Pacific Maritime Association (PMA) at Astoria, Oregon. ILWU is the certified bargaining representative of employees doing longshore work, including the loading of logs aboard ship, for members of PMA in California, Oregon and Washington. ILWU and PMA have maintained a collective bargaining relationship since the ILWU's certification in 1938 (*Shipowners Association of the Pacific Coast*, 7 NLRB 1002). Prior to 1948, this relationship was a turbulent one. However, from 1948 until the record closed in this case in 1969, there was not a significant strike with respect to the ILWU-PMA longshore contract.

Neither PMA nor any of its members involved in this case have at any time had any collective bargaining relations with Local 701.

During their negotiations in 1959 and 1960, PMA and ILWU achieved "a peaceful and stable method of resolving labor crises caused by technological advancement" (Pet. App., 10a).[1] ILWU agreed to the elimination of earlier contract provisions and practices that prevented the efficient modernization and mechanization of cargo handling in California, Oregon and Washington, and in return, PMA agreed that longshoremen would not be replaced by non-longshoremen and that the employers would provide training to enable longshoremen to operate, with skill, efficiency and safety, any new equipment brought in to modernize and mechanize the industry. The Board has described this 1959-1960 contract settlement and the weight it will give to it in the following language:

> "The automation concord between Respondents and PMA has been widely acclaimed as a history-making

1. This reference is to the opinion of the Court below. Petitioner has printed the opinion below on pages 1a through 19a of the Appendix to its Petition.

precedent, a peaceful settlement of a problem which has troubled the west coast waterfront for a number of years. The parties are now living under that agreement, and urge us to honor their agreement as interpreted by them and their arbitrator. In the circumstances here presented, we have decided to do so." *International Longshoremen's and Warehousemen's Union (American Mail Line, Ltd.)*, 144 NLRB 1432, 1442 (1963).

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"In the companion case, we found after examining the above factors that the larger automation concord between Respondents and PMA far outweighed all other considerations. Thus, the parties' 1959-60 agreement, subsequently codified and supplemented, constituted a pioneering settlement between PMA and Respondents of the larger manpower and economic problems resulting from the increasing use of mechanized equipment on the waterfront. Though there is room for disagreement as to which particular pieces of equipment have been assigned to longshoremen under this agreement, the parties have established an arbitration procedure whereby their differences can be settled. In the instant case, Arbitrator Meehan decided that longshoremen were entitled to perform the crane work in question, and both Respondents and PMA, including the instant PMA employer, Albin, now urge us to honor their agreement as interpreted by them and their arbitrator. Consistent with our decision in Case No. 19-CD-53, and for the reasons expressed therein, we have decided to do so." *International Longshoremen's and Warehousemen's Union (Albin Stevedore Company)*, 144 NLRB 1443, 1448 (1963).[2]

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2. This Court has said:

"All parties agree that this agreement was an enlightened, forward-looking step in West Coast longshore labor relations. See Kossoris, Working Rules in West Coast Longshoring, 84

As cargo-handling technology progressed thereafter, the parties found that cranes were important tools that could be substituted for traditional cargo-hoisting gear. In 1962, they adopted a Crane Supplement to their contract. It defined as "longshore cranes" the various cranes operated on land or mounted aboard ship, and it confirmed explicitly that these were to be manned by longshoremen. Because, at the time of the adoption of the Crane Supplement, floating cranes were used only occasionally for sporadic jobs of a few hours' duration to handle extra heavy loads without displacing any longshoremen, who were employed in related work, the Crane Supplement stated that these are not "longshore cranes" and that non-longshoremen could be used for their operation. However, the Crane Supplement specifically included the further provision that the Joint Coast Labor Relations Committee, the final bipartite step in the ILWU-PMA contract administration and grievance procedure, could in the future agree to designate floating cranes as "longshore cranes" by agreement reached in that Committee.

During the sixties, PMA employers developed a cargo-handling technique that would substantially reduce the man-hours involved in loading logs aboard ship. Logs were prepackaged into large bundles of 25 to 35 tons. Because their weight exceeded the capacity of the ship's gear, this new technique required that these loads be hoisted aboard ship

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Monthly Labor Rev 1 (1961); Killingsworth, The Modernization of West Coast Longshore Work Rules, 15 Ind & Lab Rel Rev 295 (1962); ILWU (American Mail Line), 144 NLRB 1432, 1442 (1963)."

Volkswag. awerk v. Federal Maritime Commission, 390 U.S. 261, 264 (1967).

by floating cranes. This pre-packaging of logs replaced a procedure by which individual logs were made up into much smaller loads by the longshoremen working alongside the ship and were then hoisted aboard ship by the conventional ship's gear. After the new technique was used for a period of time and had become an established method of cargo-handling under the mechanization and modernization procedures, it became evident that non-longshoremen operating the floating cranes were replacing the longshoremen who had operated the normal ship's gear in the previous type of cargo operation. In these circumstances, the Joint Coast Labor Relations Committee agreed to designate floating cranes as "longshore cranes" in such operations and agreed that such cranes would be manned by longshoremen in loading logs. This agreement carried out the basic commitment that the utilization of new forms of equipment to mechanize and modernize cargo-handling on the Pacific Coast would not involve the substitution of non-longshoremen for longshoremen. In accordance with this agreement, the handling of logs was carried on with longshoremen operating the floating cranes.

In Astoria, Oregon, however, it was originally believed by both the longshoremen and the stevedore companies that they could not obtain floating cranes on a "bare boat" basis; that is, that the PMA stevedore contractor could not obtain a floating crane unless it would use the employees of the owner of the floating crane to operate it. Accordingly, the stevedore contractors in Astoria used floating cranes of heavy construction contractors with their construction industry employees as the equipment and employees to hoist the logs out of water to shipboard.

On April 3, 1969, the longshoremen in Astoria decided that the contract provision as to manning of floating cranes

should be enforced in that port. Asserting that it was unsafe to work with non-longshoremen, they stopped work under the safety issue work stoppage provision of the contract[3] The Astoria longshoremen also asserted that the employers were violating the ILWU-PMA contract by the use of the non-longshoremen. While the employers acknowledged that the contract required the use of longshoremen and did thereupon put them on the cranes, they proceeded through the grievance machinery to obtain a decision that the claim that the work was unsafe was a "gimmick". The longshoremen countered by asserting that the employers' violation of the contract by the use of non-longshoremen to operate the cranes justified their action.

The issues were taken to the Coast Arbitrator. He held that the longshoremen had improperly used the safety issue as a "gimmick" to present their grievance. However, he also held, and interpreted the contract to mean, that the contract required that longshoremen be used to man these cranes. He also held that the employer's violation did not justify the work stoppage.

After the operating engineers had been replaced by longshoremen, Local 701 started picketing and filed a charge against the Astoria local, Local 50 of the ILWU. In turn, PMA filed a charge against the Local 701 picketing. After a hearing, pursuant to the provisions of § 10(k) of the Act, a three-man panel of the Board determined that the operating engineers were entitled to the work in dispute and that the ILWU was not entitled to seek it through the means proscribed in § 8(b)(4). *International Longshore-*

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3. Because of the dangers involved in longshore work, the ILWU-PMA contract includes the provision that the longshoremen may stop work if they believe in good faith that an employer operation endangers their safety. However, it also provides that a safety claim shall not be used as a "gimmick" to raise other issues.

men's and Warehousemen's Union Local 50 (Jones Stevedoring), 181 NLRB 315.[4]

In its determination, the three-man panel of the Board limited itself to a consideration of the original Crane Supplement language. It ignored the subsequent action of the Joint Coast Labor Relations Committee, which had agreed that floating cranes were "longshore cranes". It ignored the ruling of Coast Arbitrator, which held that the contract had assigned the work of operating these particular floating cranes to the longshoremen. Additionally, it ignored the employer's clearly expressed preference that longshoremen should operate these cranes.

PMA and ILWU filed petitions for rehearing and reconsideration. These were presented to the full five-man Board. By a vote of three to two on July 24, 1970, the requests for Rehearing and Reconsideration were denied.[5]

Thereafter, in the subsequent unfair labor practice proceeding, the Board affirmed its § 10(k) order despite the challenges by ILWU and PMA to both the substance of the order and the procedures by which it was procured.[6]

The Board's order was reviewed by the Court of Appeals for the Ninth Circuit. That Court made a detailed analysis of the Board's handling of § 10(k) proceedings from 1962 to date and determined, from its review of these § 10(k) determinations, that the Board had consistently honored

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4. This Determination of Dispute is printed in the Appendix to the Petition herein (pages 20a to 39a).

5. This order of the full Board is printed at pages 1-3 of the Appendix to PMA's brief in opposition to the petition herein.

6. The Trial Examiner recognized the "fundamental" nature of the challenges to the Board's procedure (PMA App. 10-12, 24-25) but acknowledged that he was powerless to deal with them. The Board's decision (PMA App. 4-5) simply ignored them. The Court of Appeals did not "entertain such a sweeping challenge to the Board's procedures" because it granted the relief sought by ILWU and PMA on other grounds. (Pet. App. 4a, n. 1).

the contractual assignment of the work and the employer's expressed preference and that the Board had consistently assigned the work in accordance therewith. The Court of Appeals held that the Board had been in error where it concluded that the ILWU-PMA contract did not require the work to be done by the longshoremen, and when it paid no heed to the factor of employer preference.

The Court of Appeals referred to the conclusions of commentators who had examined the Board's § 10(k) determinations and found that the Board had failed "to articulate any decision-making standards" (Pet. App. 15a) and to the American Bar Association's special § 10(k) committee, which had found that the Board's decision-making practices in § 10(k) matters "had accomplished little more than to inject additional doubt and uncertainty into an already troublesome and difficult area of labor relations" (Pet. App. 16a).

The Court of Appeals then stated its own conclusions with respect to the Board's procedures under § 10(k) following the decision of this Court in *NLRB v. Radio and Television Engineers ("CBS")*, 364 U.S. 573, 576 (1960) and the statement by the Board in *International Association of Machinists, Lodge 1743 (J.A. Jones Construction Co.)* 135 NLRB 1402, 1410 (1962), the first Board opinion following the *CBS* mandate, in the following language:

> "Since its *Jones* decision, the Board has consistently maintained that its policy in making § 10(k) work awards is to decide each case on its own merits without announcing any standards or principles which govern the decisions that are made. Such a practice has relieved the Board of the burden of reconciling its decisions either with precedent or with any predetermined set of standards. Such a practice makes life easy for the Board's Trial Examiners or Administrative Law Judges, and for the Board itself. To call the practice

> a policy, however, is a misnomer. It is a little like making a bouillabaisse or pot au feu. Various ingredients go into the pot and are stirred and simmered, and no matter what they are, or what quantity or quality of each is used, the product is always the same—a bouillabaisse or a pot au feu. Nobody can dispute the conclusion; nobody can say, except as a matter of personal taste, whether the result is good or bad.
>
> While the practice may be easy and comfortable for the Board, it makes judicial review virtually impossible, because the decision is totally unprincipled. There is no way for the reviewing court to determine what principles, if any, led to the decision. . . ." (Pet. App. 16a).

The Court of Appeals further stated that its own independent examination of the Board's § 10(k) decisions (in conformity with the reports of numerous commentators cited at Footnote 7 to its opinion [Pet. App. 17a]) established that the Board had consistently followed the policy of awarding the work to the employees who are assigned the work by a contract and who are preferred by employer. The Court went on to say that the Board in no way explained why it was not following its own prior decisions in this case. On this record the Court of Appeals held that the Board had engaged in this case in "standardless decision making" (Pet. App. 18a) and concluded (Pet. App. 19a):

> "In this case the only applicable collective bargaining agreement assigns the disputed work to the Longshoremen. The employers also appear to prefer that the work assignment go to the Longshoremen. In light of the Board's policy of giving controlling weight to these factors under similar circumstances, we are unable to conclude, absent convincing reasoning from the Board to the contrary, that the Board's work assignment to the Engineers is not arbitrary and capricious."

ARGUMENT

The writ sought should be denied because no novel or important issue is presented by the petition. It is well accepted that this Court has left to the Court of Appeals the task of determining whether the Board's findings of fact are supported by substantial evidence (*Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489-491 [1950]) and whether its legal conclusions are arbitrary and capricious or "rest on erroneous legal foundations". *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

The Court of Appeals correctly held (Pet. App. 9a) that the Board's findings that the ILWU-PMA contract did not assign the operation of floating cranes to longshoremen could not be sustained. There is no substantial evidence on the record considered as a whole (*Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 [1951]) to support this finding of the Board since it did not take into account the interpretation which the parties and the arbitrator had placed upon the contract[7] and therefore did not consider the contract, as so interpreted, as a factor to be weighed in making the work assignment.

The holding of the Court of Appeals on the substantiality of the evidence is not one requiring review by this Court since this "is a question which Congress has placed in the keeping of the Courts of Appeal". *Universal Camera Corp. v. NLRB*, supra, at 491.

Additionally, the determination of the Court of Appeals that the Board's finding on the contract issue was not supported by substantial evidence on the record as a whole because of the Board's refusal to take into account an interpretation which the parties and the Coast Arbitrator

7. "The substantiality of evidence must take into account whatever in the records fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, supra, at 488.

had placed upon the contract, is consistent with the rule that a question of contract construction is one of law for the courts and is not one of fact for an administrative agency. *Corbin on Contracts*, Vol. 3, § 554, pp. 218-227; *Aluminum Co. v. NLRB*, 159 F.2d 523, 525 (5th Cir., 1946), *Paterson Parchment Paper Co. v. International Brotherhood of Paper Makers*, 83 F.Supp. 928, 930 (E.D. Pa., 1949).

Clearly, the Court of Appeals was correct in stating:

> "We are not bound to accept the Board's construction of a contract when it is not supported by substantial evidence and when it is not legally correct." (Pet. App. 9a).

Having concluded that the Board's finding of fact as to the meaning of the contract was not supported by substantial evidence on the record as a whole, the Court of Appeals properly determined that the error, plus the fact that the Board had totally ignored the factor of employer preference, made the Board's work assignment determination arbitrary and capricious and therefore unenforceable.[8]

The conclusion of the Court of Appeals, that the Board has consistently awarded the work to the employees represented by the union which has the only contract assignment for that work and has consistently honored the employer's preference, cannot be challenged. It is clearly demonstrated by the authorities cited in the opinion and by the inde-

8. The Court of Appeals also noted that the Board's failure to consider that the contract had been construed by the parties and the Coast Aribtrator to cover the work in dispute may also have resulted in "a misplaced emphasis on the factors of skill, efficiency and safety". (Pet. App. 10a). The contract contained an obligation on the part of PMA to train longshoremen so that they could safely and efficiently perform work on machinery introduced as a result of new technology. As the Court of Appeals stated, "If the Board had correctly determined that the contract covered the disputed work it might have given weight to the fact that the skill problem was anticipated by the parties". (Pet. App. 10a).

pendent analysis undertaken by the Court of Appeals. (Pet. App. 17a-18a).

The refusal to enforce the Order, in the absence of the Board's showing convincing reasons for its failure to follow its own established precedents, is an appropriate exercise of the reviewing court's duty to determine whether an order of the Board is arbitrary or capricious or rests on erroneous legal foundations.

The holding of the Court of Appeals was that the Board must articulate the reasons for its departure from its established precedents (Pet. App. 17a), "decisionmaking pattern" (Pet. App. 17a) and "policy" (Pet. App. 19a) so that a reviewing court can determine whether such a departure is arbitrary or capricious.

> "... The Board may still evaluate each jurisdictional dispute on its own merits and it need not be limited by a rigid set of standards or principles. But when the Board decides that certain factors take precedence over others, it must explain why and reconcile its decisions with its past judgments. Otherwise, § 10(k) will not bring the desired stability to the process by which jurisdictional disputes are resolved, and the courts will be unable to determine whether or not the Board's decisions are arbitrary and capricious." (Pet. App. 19a).

Such a holding, articulating the responsibility of the reviewing court, does not require further review here.

The conclusion of the Court of Appeals that a "bouillabaisse or pot au feu" adjudication is contrary to law is in accordance with numerous decisions of this Court. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80 (1943); *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965).

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: January 15, 1975

Respectfully submitted,

NORMAN LEONARD

Attorney for Respondent,
ILWU Local 50

Of Counsel

GLADSTEIN, LEONARD,
PATSEY & ANDERSEN